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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: METHYL TERTIARY BUTYL  
4 ETHER ("MTBE") PRODUCTS  
LIABILITY LITIGATION

MDL 1358  
00 Civ. 1898 (SAS)

5 -----x

New York, N.Y.  
6 May 2, 2012  
7 2:10 p.m.

8 Before:

9 HON. SHIRA A. SCHEINDLIN,

District Judge

10 APPEARANCES

11 MILLER, AXLINE & SAWYER  
12 Attorneys for Plaintiff  
13 BY: MICHAEL AXLINE

14 LAW OFFICES OF JOHN K. DEMA, P.C.  
Attorneys for Plaintiffs Puerto Rico and New Jersey  
15 BY: JOHN K. DEMA  
SCOTT E. KAUFF

16 McDERMOTT WILL & EMERY LLP  
Attorneys for Defendant Exxon Mobil Corporation  
17 BY: JAMES PARDO  
STEPHEN RICCARDULLI

18 KING & SPALDING  
19 Attorneys for Defendant Chevron  
20 BY: JAMES J. MAHER

21 GREENBERG TRAURIG  
Attorneys for Defendants  
22 BY: DAWN A. ELLISON

23 BAKER BOTTS LLP  
Attorneys for Defendants Hovensa  
24 BY: CHRISTOPHER DANLEY

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1 THE COURT: Good afternoon, Ms. Greenwald.

2 MS. GREENWALD: Good afternoon.

3 THE COURT: It is afternoon.

4 Good afternoon, Mr. Axline.

5 MR. AXLINE: Good afternoon, your Honor.

6 THE COURT: Good afternoon, Mr. Dema.

7 MR. DEMA: Good afternoon.

8 THE COURT: Good afternoon, Mr. Kauff.

9 MR. KAUFF: Good afternoon.

10 THE COURT: Mr. Pardo.

11 MR. PARDO: Good afternoon, your Honor.

12 THE COURT: Good afternoon, Mr. Riccardulli.

13 MR. RICCARDULLI: Good afternoon.

14 THE COURT: Good afternoon, Mr. Maher.

15 MR. MAHER: Good afternoon.

16 THE COURT: Ms. Ellison.

17 Mr. Stack.

18 MR. STACK: Good afternoon, your Honor.

19 THE COURT: Mr. Dillon.

20 MR. DILLON: Good afternoon, your Honor.

21 THE COURT: Mr. Wallace.

22 MR. WALLACE: Good afternoon.

23 THE COURT: Mr. Krainin.

24 MR. KRAININ: Good afternoon.

25 THE COURT: Mr. Danley, good afternoon.

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1 I don't know the two of you.

2 MR. WREN: I'm Tyler Wren with Berger & Montague.

3 We're new counsel for plaintiffs replacing Richardson Patrick  
4 law firm.

5 THE COURT: In which case?

6 MR. WREN: New Jersey.

7 THE COURT: You're replacing who?

8 MR. WREN: Richardson Patrick law firm. You signed an  
9 order allowing their withdrawal and our pro hac admission a few  
10 weeks ago.

11 THE COURT: Is that the person, Mr. Kaufman?

12 MR. AXLINE: Mr. Kaufman's firm is also one of four  
13 firms.

14 THE COURT: Is he still on it?

15 MR. AXLINE: He is.

16 THE COURT: I don't know which one. So you are who?

17 MR. WREN: Tyler Wren, W-R-E-N.

18 THE COURT: From what firm is that?

19 MR. WREN: Berger & Montague out of Philadelphia.

20 THE COURT: Yes, I know the firm. The New Jersey  
21 case.

22 And you are?

23 MS. TURNER: Judith Turner. I work with the law  
24 offices of John K. Dema.

25 THE COURT: OK. So you're on the Puerto Rico case,

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1 right? No?

2 MR. DEMA: Yes, ma'am. We're both in Puerto Rico and  
3 New Jersey.

4 THE COURT: And New Jersey. OK. And your name again  
5 is what?

6 MS. TURNER: Judith Turner.

7 THE COURT: Turner, OK. Thank you.

8 All right. Welcome to the other folks who are sitting  
9 in the back.

10 So were you given a copy of the agenda?

11 So the first one is the reply letters came in I think  
12 Monday at five for a Wednesday conference. I realize we were  
13 scheduled originally for Thursday afternoon and you did  
14 calculate that as 72 hours, but I just want to reiterate less  
15 than 72 hours doesn't work. It's too much of a strain when  
16 I've been on trial as much as I've been this last year, namely,  
17 nonstop. So I just want to remind you to please stick with the  
18 usual deadline because it's too hard to absorb the material  
19 last-minute basis.

20 OK. The argument on the motion I'll put off until the  
21 end. So that brings us to plaintiffs' agenda item and the  
22 first is, oh, the format of electronic document production.

23 MR. DEMA: Your Honor, we spoke before you came on the  
24 bench and I believe it's fair to say that we have agreement on  
25 that item.

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1 THE COURT: What's the agreement?

2 MR. DEMA: That the format that liaison counsel and  
3 plaintiffs had been using will be used with all defendants and  
4 so we're going to actually reduce that -- we have it in  
5 back-and-forth exchanges, so we're going to reduce it to a  
6 specific protocol circulated, everyone will sign off on it.

7 THE COURT: All right. And that includes the  
8 production in hard copy form because one of the disputes I  
9 understood here was a defendant named Hovensa had produced  
10 documents in hard copy and said Rule 34 doesn't require them to  
11 convert them to electronic format, and then they said PDF is  
12 enough and all that.

13 What is the resolution of that?

14 MR. DANLEY: Your Honor, my name is Chris Danley. We  
15 represent Hovensa. We understand --

16 THE COURT: I want to know what it is.

17 MR. DANLEY: -- that we would go back and redo the two  
18 productions in the Puerto Rico case per the agreement between  
19 liaison counsel and Puerto Rico.

20 THE COURT: I know, but I keep trying to find out what  
21 is that agreement. How are you going to produce paper  
22 documents, so to speak? Are they going to be converted to OCR  
23 format?

24 MR. DANLEY: Yes, your Honor, as spelled out in the  
25 letter between liaison counsel and Puerto Rico.

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1 MR. RICCARDULLI: Yes, your Honor. The hard copy  
2 documents will be imaged as single-page TIFFs with load files  
3 and OCR.

4 THE COURT: Very good. That's what I was going to  
5 say. If that wasn't the agreement, it wouldn't make any sense  
6 to me. So that is the agreement.

7 With electronic documents you've agreed on a format  
8 too? A standard format with the production of documents  
9 created electronically, not hard copy converted, but electronic  
10 documents.

11 MR. PARDO: I don't know that we've had that  
12 discussion.

13 THE COURT: You should do that too.

14 MR. PARDO: It's not been raised as an issue the way  
15 we made those productions before. We're happy to have that  
16 discussion with plaintiffs to see if there's some preferred way  
17 they want this done. But there's been no objection to the way  
18 the different defendants have done it so far to my knowledge.

19 MR. DEMA: We will include that in the protocol, your  
20 Honor --

21 THE COURT: You should.

22 MR. DEMA: -- because we it will come up in the ESI.  
23 We have a number of letters out. We have no idea on the  
24 plaintiffs' side whether the defendants have complied. There's  
25 no prefix designations they're using for ESI. There's

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1 obviously emails that have staple marks that have been Xeroxed,  
2 attachments that are referred to not attached.

3 THE COURT: Not good. That's what I'm trying to say.  
4 We need ESI protocol for the production format. These days  
5 that's sort of becoming the industry standard in litigation is  
6 to have a protocol that both sides are living with.

7 And I know that the Commonwealth has an awful lot of  
8 documents and papers. So the agreement you reached with  
9 Hovensa and others has to apply to you too. That's the paper  
10 side. On the electronic side, we want to get together, and the  
11 former production is particularly important with the emails and  
12 attachments. There's certain metadata is included now as  
13 standard protocol, certain that isn't dealing with attachments.  
14 There's all kinds of protocols.

15 There's samples if you want me to give you samples.  
16 There's samples around.

17 MR. PARDO: We'll have the discussion with plaintiffs,  
18 your Honor.

19 THE COURT: You don't want my samples. I can tell,  
20 Mr. Pardo, you don't want my samples. But if you change your  
21 mind, you're welcome to them.

22 MR. PARDO: Thank you.

23 THE COURT: Then the next dispute again had to do with  
24 Puerto Rico. Mutual exchanges of ESI search phrases, the  
25 plaintiffs offered to produce their search phrases if defendant

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1 reciprocate.

2           There I don't think you have an agreement or maybe the  
3 same ten minutes in the hall worked out for that one too?

4           MR. DEMA: The ten minutes in the hall did not work  
5 for that one, your Honor. We just think it practical to avoid  
6 future disputes, and we are perfectly willing to show the  
7 search terms that we have used, and we simply say let's have an  
8 even exchange and a level playing field.

9           THE COURT: And why don't defendants want to do that?

10          MR. PARDO: Well, your Honor, it sounds good in  
11 theory.

12          THE COURT: It's not theory anymore. We have this  
13 great big cooperation word running around in civil litigation.

14          MR. PARDO: And it's in the rules now.

15          THE COURT: I haven't seen the word in the rules, but  
16 the idea is there.

17          MR. PARDO: The issue that we have is that many of  
18 us -- I think most of the defendants already made our ESI  
19 productions a long time ago. Remember, plaintiffs didn't do  
20 this and are only now -- and they've a done some, but only now  
21 are getting to this.

22          So what he did is we went to them and said, look, we  
23 did this in New Jersey and it worked. If you would like, we're  
24 not demanding it, but if you would like to share your search  
25 terms with us, we'll look at them and give you our input on



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1       them to the extent you want it. We're not asking them to.

2               What they came back and said, OK, we'll give you ours  
3       but you got to show us yours. And here's the problem. They  
4       never -- they've had some of our ESI now for years -- they've  
5       never raised an issue about it. So we're not aware of any  
6       disputes. Presumably they've gone through our ESI. Our  
7       concern, frankly, is they're going to look at our terms and  
8       say, guess what, you missed one and we're going to have to go  
9       back and redo all this ESI that they never raised an issue  
10      about, frankly.

11             And, moreover, if they do have issues with individual  
12      defendant's ESI, with all due respect, I love to be liaison  
13      counsel and love to talk to my codefendants, but they ought to  
14      take those issues up with the individual defendants.

15             If we want to talk about protocols for how to do some  
16      ESI going forward --

17             THE COURT: That's not the search term issue. That's  
18      a format issue.

19             MR. PARDO: It is.

20             THE COURT: It's a format or production that should be  
21      standardized. We didn't know that ten years ago when we  
22      started working together on this MDL. It wasn't as in and  
23      established an idea as it is today. We have a production  
24      protocol, but OK.

25             MR. PARDO: I don't even know if I had email ten years

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1 ago.

2 THE COURT: Oh, you had email. We, the courts,  
3 weren't advanced.

4 MR. PARDO: Mutuality assumes we're kind of in the  
5 same spot but we're not because many of us, most of us are done  
6 with it. They're just kind of getting into it. If they don't  
7 want to share their search terms with us, that's OK, they don't  
8 have to. But don't come back to those of us who have finished  
9 our productions and say let's go through what you did now.

10 THE COURT: Are you saying you did it case specific or  
11 these were productions, you made generalized productions years  
12 ago such that you're off the hook permanently? If there was a  
13 brand-new plaintiff in a brand-new case tomorrow, would you say  
14 we're just going to give you all the discovery we've given over  
15 the years? It isn't case specific, there's no generalized  
16 discovery.

17 MR. PARDO: This is what we're talking about here,  
18 your Honor, is case specific. Obviously, there have been lots  
19 of productions made over the years. Liaison counsel, we have  
20 these things. We're not even talking about those. And I  
21 haven't heard plaintiffs to say they want us to go back and do  
22 anything like that. Some of these productions are ten, 11, 12  
23 years old.

24 Talking just about the Puerto Rico productions, but  
25 even in that case, many defendants, including my client, we

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1 made these well more than a year, I think even two years ago.

2 We don't want to revisit this now. We're done.

3 Again, if they don't want to avail themselves of what  
4 we thought was something of a courtesy, if you want to share  
5 them with us, please do. Then that's OK, we don't need to see  
6 them. We just don't want to go back and have to do this, share  
7 our whatever search terms we used. Many of these productions  
8 were made multiple times. I don't even know we would be able  
9 to unwind all the different search terms we might have used for  
10 these different ones. So it's a real burden on those of us who  
11 are done.

12 MR. DEMA: Were that an accurate recital I would have  
13 no problem. The problem is that liaison counsel does not  
14 necessarily speak for the other defendants. When we have an  
15 issue, they say don't come to them, go to the individual  
16 defendants.

17 THE COURT: And he said that again.

18 MR. DEMA: And we have at least four letters, maybe  
19 five out to other defense groups of the ten, at least half,  
20 saying we don't know that you have produced any ESI.

21 THE COURT: You said that to them?

22 MR. DEMA: Yes, individually. Shell, Hovensa, there's  
23 a number. And so the presentation that they are finished is  
24 inaccurate. Exxon may be finished. We don't have any letter  
25 out to them.

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1 THE COURT: Right.

2 MR. DEMA: But, in general, it's not, and we believe  
3 the pushback is simply because the ESI searches were not done.  
4 And the Commonwealth is being characterized as being late to  
5 the party.

6 THE COURT: I understand. So we happen to have  
7 lawyers for some of those people to whom you have letters out.

8 So, you know, Mr. Wallace, you took a risk coming, I  
9 realize that, because I remember you. So you still represent  
10 Shell?

11 MR. WALLACE: Indeed.

12 THE COURT: I'm using you as an example because he  
13 mentioned there's a letter out.

14 Has Shell done its ESI production in the Commonwealth  
15 of Puerto Rico case or not?

16 MR. WALLACE: So far as I know, the answer is yes.  
17 But I must confess that I'm at something of a disadvantage  
18 because I'm not familiar with this particular letter.

19 I know that Shell has produced ESI. I also know that  
20 there is something of a misunderstanding between Shell and the  
21 Commonwealth about their expectations and it turns on this.  
22 There's another defendant in the Puerto Rico case named Sol --

23 THE COURT: Sol?

24 MR. WALLACE: S-O-L.

25 THE COURT: Thank you.

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1 MR. WALLACE: -- which at one time was Shell and that  
2 company, to my understanding, has produced ESI and we have as  
3 well, that is to say, there are other defendants in the Shell  
4 family that have produced ESI.

5 My guess is, but this is only a guess, that the  
6 Commonwealth was expecting from Shell production of materials  
7 that really came from Sol, but I would have to work that out  
8 with Mr. Dema.

9 THE COURT: Sure. Let me try this as a hypothetical  
10 instead. Hypothetically -- this can be back to Mr. Pardo or  
11 Mr. Wallace or whoever -- hypothetically, if a particular  
12 defendant has not yet reviewed their ESI in the Commonwealth  
13 case, then why shouldn't there be an exchange of these search  
14 terms along the idea that cooperation in the development of  
15 search terms is good for everybody. It eliminates disputes  
16 down the road, eliminates motions to compel or for protective  
17 orders. People work cooperatively. They figure out what they  
18 need.

19 I can understand your argument you did this two years  
20 ago and there's been no complaints. It's like opening up a can  
21 of worms and say here's what you did, a-ha, you didn't look for  
22 this word. I understand your point. But if you hadn't done it  
23 at all, hypothetically, I don't know who that may apply to, if  
24 you hadn't searched your ESI yet, why isn't this the way we're  
25 conducting all litigation nowadays in the federal court?

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1           We're trying to. We're trying to get lawyers, we're  
2           trying to get lawyers to share their search terms and work  
3           together to develop search terms that will be applied to both  
4           sides' sets of data. It's the better way to go. My experience  
5           in this most recently is in a slew of securities cases, not  
6           your field, luckily, not this MDL, even more luckily, but it  
7           eliminates a lot of disputes to make the lawyers work together  
8           on search terms.

9           So if there were hypothetically a case that the  
10          defendant hadn't done it yet, why shouldn't they exchange  
11          search terms?

12          MR. PARDO: I sat long enough, Mr. Wallace would jump  
13          up.

14          THE COURT: But he didn't do that for you. He left  
15          you out to dry by yourself.

16          MR. PARDO: Hypothetically, if there's such a party  
17          out there who has not done any ESI --

18          THE COURT: You have to reluctantly admit.

19          MR. PARDO: -- I have to say it sounds reasonable. I  
20          think they need to take that up though with the individual  
21          defendants.

22          THE COURT: Fair enough. I think there's a bit of a  
23          concession here that going forward, if a party has not searched  
24          its ESI at all, it's at square one, you are to work  
25          cooperatively to develop the search terms for both sides. This

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1 would be true of any new case, but certainly in this case, if  
2 that fact is a fact.

3 Now, I gather what the defendants are saying is  
4 they're disagreeing with you that there are five such  
5 defendants but only you and they know. Even Mr. Wallace said  
6 I'm not certainly saying that's not the case because I'm not  
7 familiar with the letter. I have to sit down with you.

8 If it turns out in fact that either Shell itself or  
9 one of the Shell companies hasn't done it yet, then I would say  
10 he has to work with you to develop the appropriate search  
11 terms.

12 But I agree with Mr. Pardo, if you did it two years  
13 ago and there's been no complaints, it's not a good thing.  
14 It's just opening the proverbial can of worms.

15 So you understand that is a ruling. I'm done with  
16 that topic. So, going forward.

17 MR. DEMA: Yes, ma'am. Just a footnote is that the  
18 other letter out is to SOL that was mentioned by Mr. Wallace.

19 THE COURT: Sounds like Mr. Wallace has to meet with  
20 you.

21 MR. DEMA: Yes, ma'am.

22 THE COURT: That would be a good thing. I think you  
23 get the point of the ruling, so to speak, and I hope the  
24 defense does as well.

25 MR. PARDO: We do, your Honor. Thank you.

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1 THE COURT: So now we go to defendants' agenda items.

2 The first one is this delineation of the Tamcrest site  
3 where plaintiffs incorrectly delineated that particular site  
4 accidentally, I guess allegedly accidentally, delineated a  
5 different country club. And this error has been discussed.

6 And in the April 25 letter defendant asked the Court  
7 to order production of the correct delineation and instruct the  
8 plaintiffs to expedite responses, to cite specific discovery  
9 requests defendants might need after receiving the revised  
10 delineations.

11 In the April 30 letter, plaintiffs said they now  
12 provided the revised delineation on April 27, is that right,  
13 did you get a revised delineation?

14 MR. PARDO: We did, your Honor. There are other  
15 issues about the delineations. But this issue I believe with  
16 the country club has been resolved.

17 THE COURT: Is there an issue that I need to address  
18 today or no?

19 MR. PARDO: Specific to that, no, your Honor.

20 THE COURT: So we go to the next one. The next one is  
21 called Puerto Rico plaintiffs' failure to delineate its trial  
22 sites.

23 Defendants' April 25 letter said plaintiffs had not  
24 yet delineated its trial sites. On April 27, plaintiffs did  
25 advise the defendant which three of their ten they were



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1 dropping and they say they produced delineations for the  
2 remaining seven. But they also called them preliminary  
3 delineations. They want to reserve the right for the expert to  
4 amend or modify the delineations.

5 Apparently, in June of 2011, which of course I can't  
6 remember but that's why God created transcripts, June 2011 I  
7 said that the delineations should be final and the plaintiffs  
8 should live with the delineations they drew.

9 But, apparently, October in the transcript I said  
10 something like oh, no, that was earlier, October 2010, I  
11 supposedly said with reference to a number of private wells  
12 that were near the trial sites, I said this is far from final  
13 and it would take more time to ascertain all the number of  
14 private wells as opposed to public wells without an expert.

15 So I wasn't talking about the same subject, sounds  
16 like it was two different subjects.

17 Also plaintiffs say that their nontestifying  
18 consultants attempted to draw the site geographic boundaries  
19 so-called generously so the discovery could cover the entire  
20 scope of ground water contamination.

21 If these were drawn generously, it seems to me that  
22 these delineations should be final and binding and not amended  
23 and modified because they could change dramatically. That  
24 wouldn't be fair.

25 MR. AXLINE: Your Honor, with respect to all of the

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1 delineations that we've provided today in both New Jersey and  
2 Puerto Rico, we have made it clear and the defendants have  
3 accepted and I thought your Honor had understood that these  
4 delineations were for the purpose of narrowing down what the  
5 defendants had to look at. They've been produced by our  
6 consulting experts, not by our testifying experts.

7 THE COURT: Right. But they delineate the geographic  
8 limitations of the site.

9 MR. AXLINE: Correct. But we've always reserved the  
10 right when we have our testifying experts do a closer analysis  
11 of these.

12 THE COURT: But you can't expand the site at that  
13 point. You can contract it. You could find more things within  
14 it, but you can't expand the geographic limitation. That could  
15 change the site entirely.

16 MR. AXLINE: That's why we drew them generously.

17 THE COURT: I understand that. So now you're bound to  
18 that. You can draw the line narrower or make less of it, but  
19 you can't suddenly double it. That would not be fair. It  
20 would change entirely.

21 So I'm saying the delineations you drew are final on  
22 the outer limits. You can always contract them. That seems to  
23 be OK, but you can't expand them.

24 MR. AXLINE: Understood, your Honor.

25 THE COURT: OK. With that understanding, what's left,

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1 Mr. Pardo? Seriously. It won't be more, it could be less of a  
2 space, but not more.

3 MR. PARDO: I guess the problem with that is we may  
4 end up doing more unnecessarily. And as much as I would like  
5 to see these, as much as I would like to see these delineations  
6 be drawn realistically since they have experts today who can do  
7 this for them, that was the point last year, you know, if  
8 they're going to get smaller, I suppose that's certainly better  
9 than them getting larger.

10 THE COURT: Correct.

11 MR. PARDO: You know, this is, as you've noted, I  
12 think, this is the exact same issue we went through in New  
13 Jersey last year.

14 And what you said to them then was not even really  
15 that they could get smaller. You have experts, I understand  
16 you have report deadlines and deposition deadlines, but you  
17 have experts today who will draw the circle or whatever it  
18 looks like that you're going to live with. That's it. It will  
19 not change.

20 Now it's going to get smaller. That's what they're  
21 saying.

22 THE COURT: In fairness, while I realize you may do  
23 some unnecessary work, not to make a pun, the less exposure you  
24 have the better. So if it gets smaller, that's only to your  
25 advantage in defending and/or in damages. I don't see how

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1 you're hurt by the site shrinking. You're hurt by the site  
2 doubling.

3 Now, I understand you may spend time on the periphery  
4 and it becomes irrelevant. You spend precious resources,  
5 defense moneys unnecessarily, but life isn't perfect. And, you  
6 know, the same thing is true in any commercial case. If three  
7 claims are dismissed and summary judgment of five remain, the  
8 defense is happy that the three are gone even though they took  
9 discovery as to those three. They're still happy the case is  
10 pared down to five claims, not three.

11 MR. PARDO: I agree. But if we're talking about an  
12 area, OK, I understand it can't get bigger.

13 THE COURT: He just agreed. He said he understands  
14 that.

15 MR. PARDO: What if it just moves? You could take the  
16 area --

17 THE COURT: What does that mean, rotates?

18 MR. PARDO: What if they move it --

19 THE COURT: Wait, Mr. Pardo, I don't know what moves  
20 means.

21 MR. PARDO: Well, we're dealing with a physical area,  
22 call it what it is, an acre.

23 THE COURT: It's not any acre. It's delineated on a  
24 map or grid. It's a specified acre.

25 MR. PARDO: So it could get smaller within that area.

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1 What I don't want them to come back and say is I got a new area  
2 but it's the same size moved over.

3 THE COURT: No. I told them they can't change the  
4 boundaries out. You can change the boundaries in. So it's not  
5 going to move.

6 MR. RICCARDULLI: Your Honor, there's just one other  
7 point here, and I understand that plaintiffs have drawn these  
8 generously and understand the scope may change. But in the New  
9 Jersey case, where they did in fact draw some of these  
10 generously and when we then went to take discovery within that  
11 boundary, the state then complained this was too much work for  
12 us, now that we're taking too much discovery of the state  
13 within that geographic boundary, and we've been limited on  
14 depositions on third party sites.

15 THE COURT: Who did the limiting?

16 MR. RICCARDULLI: We're in front of Special Master  
17 Warner now trying to work this dispute out. But plaintiffs  
18 draw these delineations, capture lots of sites. But when we go  
19 to take discovery from them in those delineations, they  
20 complain it's too much work.

21 THE COURT: I don't want to step on any toes, but if  
22 it's within the delineation, it seems to me it's an open field  
23 for discovery.

24 MR. AXLINE: I think Mr. Riccardulli is mixing apples  
25 and oranges, your Honor. The defendants attempted to take

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1 discovery on every conceivable release site, whether it was  
2 MTBE or not within the delineated sites. We offered to make  
3 the files for those sites available to them but objected to  
4 them taking depositions and extensive discovery as to every  
5 conceivable site. I think that's what Mr. Riccardulli is  
6 referring to.

7 THE COURT: Again, not to step on anybody's toes, but  
8 if it's within the delineated site and it shows no release of  
9 MTBE, then I don't see why they would take discovery of it. I  
10 would like them not to. But if it's within the delineated area  
11 and there's any MTBE, they're entitled to discovery.

12 MR. RICCARDULLI: In terms of the sites that are not  
13 MTBE sites, we have taken discovery of the State of New Jersey  
14 on those because, obviously, there's other contaminant issues  
15 within that area. If the Commonwealth is going to say this is  
16 the area of ground water that's impacted, it should be fair for  
17 us to take that discovery because --

18 THE COURT: Of every single site in the delineated  
19 area not matter what --

20 MR. RICCARDULLI: Where there's been a release.

21 THE COURT: I know, the release of something else  
22 completely unrelated.

23 MR. RICCARDULLI: Until we get their expert reports,  
24 we won't know they're saying this is in fact the full area of  
25 ground water that's contaminated by your site and now we need

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1 to know what else is in that water. So this does cut both  
2 ways. It's fine if it doesn't get any bigger.

3 THE COURT: It's not going to get any bigger.

4 MR. RICCARDULLI: And it's great if it shrinks, but we  
5 won't know that it shrinks until expert phase. And we don't  
6 want to now start taking discovery and hear you can't take that  
7 discovery in those areas even though it's at issue because then  
8 it's too much work on the plaintiff.

9 I mean it needs to be either, if they want more time  
10 to narrow these down, you may recall in the New Jersey case  
11 when we served these requests even for site files, the  
12 plaintiff said let me go back and look at a handful of these  
13 which we think were drawn too big. Let's cut those back and we  
14 will narrow the work on ourselves.

15 If they need to do that here in Puerto Rico, I think  
16 we should set a deadline by which that happens. Otherwise,  
17 it's difficult for us to know what discovery we can take.

18 THE COURT: Well, it's kind of hard to have it both  
19 ways. If there are release sites within this larger  
20 delineation that may shrink but hasn't, even if it's not MTBE  
21 release site, it may introduce other contaminants into the  
22 ground water because it may be proximate to a contamination  
23 that you claim is all caught by MTBE, but, in fact, the other  
24 contaminants have a big portion of that contamination. You  
25 can't have it both ways. If there are other sites within the

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1 delineations that are important to the defense, how could you  
2 say you can't take discovery of those?

3 MR. AXLINE: Well.

4 THE COURT: This is really kind of a big issue.

5 MR. AXLINE: It is. And the way that we resolved it  
6 in New Jersey was Mr. Riccardulli is correct, we gained  
7 additional time to have our experts do a more complete analysis  
8 of the areas and we were able to reduce those. Even after  
9 reducing those, the conclusion the Court came to after  
10 extensive discussion was the defendants did not get to take  
11 complete discovery on every single site that had a release  
12 site, MTBE or not.

13 THE COURT: What did I rule?

14 MR. AXLINE: How you resolved it was you told the  
15 defendants, look, you can copy the state's files for these  
16 other sites that don't involve MTBE but that are release sites  
17 within the geographic area and you can give those to your  
18 experts and that's it. That's all you get. You don't get to  
19 conduct depositions on every single one of those sites --

20 THE COURT: Is Mr. Axline accurate in his memory?

21 MS. ELLISON: No, that's not my memory. I think that  
22 discussion was in the context of full expert discovery on other  
23 sites and expert reports. I don't think we briefed this in the  
24 context of closing down all discovery on the delineations. And  
25 I believe that in that very same transcript we were discussing



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1 the plaintiff's appeal of PT068 and you expressly said certain  
2 discovery has to be permitted within the delineations. If you  
3 don't want it, it's within your control to make them smaller.

4 MR. AXLINE: Your Honor, the transcript is what it is.  
5 But what you said was to the State of New Jersey, give them the  
6 files that are on the sites that they say they're interested  
7 in -- this had nothing to do with expert analysis -- and put  
8 them in a room and the defendants get to copy those files,  
9 that's it.

10 THE COURT: I don't know if that's it. Up until then,  
11 they agree with you. Produce the site files, put them in a  
12 room, let them review them. I don't know if they agree with  
13 the last phrase, "and that's it." After they review them they  
14 may say as to this particular release, we think we need XYZ  
15 more. As to this, we don't, we're satisfied. But the first  
16 step is to put them in a room with the site files and see what  
17 happens next.

18 MR. AXLINE: If I could just continue, I think the  
19 transcript did say, because I've read it several times, that's  
20 it.

21 The defendants nevertheless came back and are now in  
22 front of Special Master Warner saying for a couple of these  
23 sites -- they talked to us saying for a couple of these sites,  
24 we do have a few additional questions we would like to ask at  
25 the depositions of the site managers for those sites. Some of

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1       them we heard their question, we said OK, that's going to be  
2       short, no problem. Others are going to Special Master Warner.

3               So I guess what I would say here, your Honor, is that  
4       the parties have an opportunity to meet and confer.

5               THE COURT: OK.

6               MR. AXLINE: First to look at the number of non-MTBE  
7       release sites that are within the delineated area to see what  
8       the size of the problem is, and then to see how many of those  
9       the defendants are truly interested in and see if we can work  
10      that out.

11              THE COURT: OK. So the suggestion is that the  
12      plaintiffs will produce the site files for all releases in the  
13      delineated area. The defendants will review them on-site or  
14      wherever and then there will be a meet and confer where the  
15      defendants say we're satisfied with this one but on this one we  
16      want to ask some questions of the site manager and this one we  
17      want to depose so and so and this one we don't more and then  
18      you'll tee up the dispute if there is one.

19              MS. ELLISON: Your Honor, that is my concern. I'll  
20      admit my client isn't in Puerto Rico, which is how we started  
21      discussing this. But our concern is the statement you made  
22      which we perceive to be during the back and forth you often  
23      have between the parties where you say "and that's it," and the  
24      plaintiffs have grabbed on to that as if you foreclosed all  
25      discovery. And we just want to make clear that there may be

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1 situations where additional discovery is warranted.

2 THE COURT: I understand. Look, the problem is we  
3 have conference after conference with the judge for year after  
4 year where you're going to say things that aren't so perfect.  
5 So if I used the phrase "and that's it," it doesn't mean it was  
6 a thought-out ruling.

7 It sounds like the better way is to say site by site,  
8 after you produce the site file, after they review them, they  
9 let you know whether they're satisfied or whether they need  
10 more. You may agree on some, disagree on others, which is  
11 what's happening. And then somebody resolves it, either the  
12 special master or this Court. That's really the better way. I  
13 can't really say "and that's it," even though I may have said  
14 those words.

15 So now we turn to the discovery request regarding the  
16 non-test site which was the subject of our last conference. We  
17 went on and on about that for a while.

18 At the last conference, I guess it was April 12,  
19 plaintiffs said they thought there was going to be some  
20 laboratory data that may exist for the non-test sites. And I  
21 did say we may learn that some of these so-called non-test  
22 sites were in fact tested and it was too early -- this is a  
23 quote -- too early to dismiss with prejudice because some of  
24 them may indeed have been tested. Even if not by the  
25 Commonwealth, they may have been tested either by one of the

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1 defendants or by other property owners.

2 And so there was going to be service of Rule 34  
3 document requests on some defendants and administrative orders  
4 against certain nonparties. Some things have been done. I  
5 understand plaintiffs served some discovery requests on  
6 April 23.

7 And as far as administrative orders, on April 12,  
8 Mr. Dema said they were going to go out the following week.  
9 There was some delays, but counsel was told that the  
10 information sought will be provided in time to get the report  
11 back to the Court within the 60-day time frame.

12 So it sounds like this process is moving forward with  
13 respect to so-called non-test sites.

14 Now, one of the problems is in these requests to the  
15 defendants, they didn't just seek testing data, which is what I  
16 thought we were going to do only. Now they wanted site  
17 documents, mediation files, property ownership records, a lot  
18 more than just simple question whether or not there were tests  
19 for contaminants, which is all I thought we were going to do at  
20 this phase, Mr. Axline or Mr. Dema, so that we could find out  
21 which of the 400 non-tests remain non-tests or cross over to a  
22 different category.

23 So I understand the defendants' frustration, so to  
24 speak, instead of getting the simple question, do you have test  
25 results, you want everything, site documents, mediation or

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1 property ownership.

2 Why all that now, why not just find out if it's a test  
3 or non-test site?

4 MR. DEMA: It all relates to the universe of the tests  
5 that were done. We want to, A, be sure that the tests were  
6 done are within a particular area and not leave it out because  
7 the defendants have challenged us on a Commonwealth-wide basis  
8 to show every place there was MTBE. So all we've done, and I  
9 didn't know that there was any restriction on discovery because  
10 certainly --

11 THE COURT: This wasn't really full-blown discovery on  
12 a site. All it was supposed to be was to take 400 sites in  
13 column A and see if any of them go over to column B because, in  
14 fact, even if the Commonwealth didn't test, somebody might have  
15 tested for MTBE and there may be a test result, in which case  
16 it moves out of the non-test category. That's all I was trying  
17 to do and I was trying to do it fast.

18 Once you say produce all your litigation files, your  
19 ownership files, you're basically taking full discovery on the  
20 very sites that you shouldn't have any discovery on if there's  
21 no positive tests, so to speak.

22 Is that what you were going to say, more or less,  
23 Mr. Pardo?

24 MR. PARDO: Your Honor, you're making my arguments for  
25 me, which makes me feel smarter than I am.

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1 THE COURT: Maybe I'm smarter than I thought. Anyway,  
2 one of us is.

3 All I'm trying to say, that was their position, at  
4 this point --

5 MR. DEMA: That position may well have been cured had  
6 they come to us and not teed it up directly to you because  
7 we're certainly willing to discuss this. And if they thought  
8 that was over the top --

9 THE COURT: It's not over the top down the road.  
10 Right now let's see what moves out of column A. So right now  
11 if there are Rule 34 requests that you served on them, they're  
12 limited to whether testing was done, give them an up or down,  
13 let them know whether there was a test and if it's positive for  
14 MTBE.

15 MR. DEMA: The testing was done and all the results  
16 from that test.

17 THE COURT: If a test was done, obviously, we need the  
18 results, yes. That's it for now, and then we'll see with  
19 respect to anything that moves over to a different column. It  
20 may go into full discovery, but not just yet.

21 MR. PARDO: So if a test was done, the test results.

22 THE COURT: Yes, absolutely.

23 MR. PARDO: Fair enough.

24 THE COURT: Now, what about those 22 sites that were  
25 not identified on plaintiffs' 2010 site list and never been at

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1 issue in this litigation, what about those 22? I don't really  
2 quite understand what that one is about.

3 MR. PARDO: These are sites, your Honor, that were  
4 never on their site list.

5 THE COURT: Why are they here now?

6 MR. PARDO: I don't know.

7 THE COURT: How did they get here?

8 MR. DEMA: They get here because life goes on, your  
9 Honor. We have a regulatory agency. We have, for example, one  
10 company that bought another oil company and so as part of the  
11 process of purchase and sale, there was a requirement that  
12 tests be done of all the underground storage tanks and, voila,  
13 leaking underground storage tanks showed up.

14 I didn't know that this Court, based on your ruling of  
15 nondetects without prejudice being dismissed and bring them  
16 back whenever you wish, I never thought that anything was  
17 frozen in time.

18 And so these are -- if sites come up on a regulatory  
19 basis that should be added, then we produce that information to  
20 defendants, I think that's our obligation, and that's where the  
21 sites come from.

22 THE COURT: What's wrong with that answer?

23 MR. PARDO: The problem is it's a constantly moving  
24 target.

25 THE COURT: So is the world. All he's saying is it's

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1 a fairly big geographic area and new information turns up all  
2 the time. Who knows.

3 MR. PARDO: I'm not hearing an explanation for how  
4 this turned up, OK. All I know --

5 THE COURT: He just gave one example. Somebody  
6 purchased somebody and tested the ground water or the land or  
7 something and got a positive test or something.

8 MR. DEMA: If Mr. Pardo would like me to after this  
9 conference give him an explanation of each of the 22 sites and  
10 how the regulator came with them, I will, and we can address it  
11 outside the scope. But essentially it was never the impression  
12 of the Commonwealth that there was a freeze.

13 THE COURT: Right. But I think what I think he's  
14 saying is there may not be a freeze, but if one of these 22,  
15 contrary to what you're representing, didn't just turn up but  
16 in fact was five or six or seven years old, then you shouldn't  
17 be able to add it now.

18 MR. DEMA: And I'm more than happy to meet with him,  
19 go over each of the 22 locations.

20 THE COURT: And explain that they're really new within  
21 the last whatever it is, 12 months, six months.

22 MR. DEMA: Certainly the discovery would have to be  
23 new.

24 MR. PARDO: At the last conference, your Honor did say  
25 if there are new sites that come up, it's a different lawsuit.



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1 And here's the problem. This happens now. Who's to say in two  
2 weeks I'm not going to get another list and then there will be  
3 another list?

4 THE COURT: It would be, one would think, if there was  
5 so-called another list, it would have one or two sites. But in  
6 any six-week or six-month period, you might think a site would  
7 be added if the regulatory agency discovers a new problem. It  
8 may not be a new problem, but it's a test that shows the  
9 problem created by an old release.

10 MR. PARDO: We've had this list of about 700 for  
11 years, OK, and what we've just done now and some -- gotten rid  
12 of some, some we think should go. What we're now at is 722  
13 kind of thing. Next week, it could be 750 and who knows.

14 THE COURT: Look, I think the right thing to do here  
15 is Mr. Dema says I can meet with Mr. Pardo or Mr. Riccardulli  
16 and explain why each of these 22 are new to the list. And  
17 after you hear the explanation, you may want to come right back  
18 to court and say now I can make a very precise motion, your  
19 Honor. They should have known about this no later than two  
20 years ago, and if you're right about that, you're right, and it  
21 should be gone. But if in fact it pretty much just turned up,  
22 then it either can be added to the suit because there's no harm  
23 done or it should be a new suit. I don't know which. It may  
24 depend on what caused it to be discovered now. Is it a  
25 release, old release but new test. I don't know what it is.

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1 I think at first instance he should meet with you and  
2 go over all 22 factually.

3 MR. DEMA: And certainly, your Honor, it's not going  
4 to affect the tests, the trial sites that Commonwealth picked  
5 nor will it affect, just doesn't have an effect.

6 THE COURT: Well, I accept your offer and instruct the  
7 defendants to meet with you. They should meet with you and  
8 listen to the story on each of the 22 sites and then you're  
9 welcome to come back to contest any or all of them being added  
10 at this point. I doesn't want to rule until he tells you the  
11 story.

12 MR. PARDO: Fair enough. If that's the instruction,  
13 we will honor it, of course. I will meet with him.

14 THE COURT: OK. And please do that before the next  
15 conference.

16 MR. DEMA: Yes, your Honor.

17 THE COURT: These things are usually a month apart.

18 MR. DEMA: Yes, your Honor.

19 THE COURT: Now, as far as those administrative  
20 requests, they're out?

21 MR. DEMA: I am told this morning that they started to  
22 go out today and there's a ten-day turnaround and that will be  
23 followed, if it's not honored, by orders to test. And so we're  
24 trying to do it within the 60-day frame that you set on  
25 April 12.

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1 THE COURT: Sixty days from then?

2 MR. DEMA: From then, yes, your Honor.

3 THE COURT: That expires June 12, give or take.

4 MR. DEMA: We hear the clock ticking, your Honor.

5 THE COURT: OK. I think that takes care of this  
6 topic.

7 So that takes us to the last topic other than the oral  
8 argument which is the New Jersey plaintiffs so-called delay in  
9 scheduling 30(b)(6) depositions. I thought this one might be  
10 worked out.

11 MR. PARDO: This has, I believe, been worked out.

12 THE COURT: I think so too.

13 MR. PARDO: They will get us these dates for all the  
14 outstanding depositions for the next three weeks.

15 MR. KAUFF: Your Honor, the agreement Mr. Riccardulli  
16 and I reached was that we would both mutually try to set for  
17 all depositions on both sides 30(b)(6) fact witnesses that have  
18 been noticed as of yesterday within the next three weeks.

19 THE COURT: OK. So that's not for me right now.

20 MR. RICCARDULLI: That's correct, your Honor.

21 THE COURT: OK. Then that's done too.

22 MR. RICCARDULLI: Your Honor, before we move on, there  
23 was an original item on the agenda that we submitted to the  
24 Court last week which was defendants' outstanding discovery  
25 request of the New Jersey DEP plaintiffs.

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1 THE COURT: I missed that.

2 MR. RICCARDULLI: In plaintiffs' reply letter. And  
3 just so you understand, your Honor, this issue has been, the  
4 parties met and conferred and did resolve it, but we had  
5 indicated to the plaintiffs that we just wanted that the  
6 agreement be put on the record so I'm going to do that now.

7 We had asked that the plaintiffs either produce  
8 certain requested materials that were outstanding by May 11,  
9 2012. However, if unavailable, that they explain sort of the  
10 search that they used to try to find these documents or these  
11 materials. And we've reached agreement that that schedule is  
12 agreed to, so we just wanted to put it on the record so it was  
13 clear.

14 THE COURT: OK. Good.

15 MR. PARDO: Two other minor issues very, very briefly.  
16 We have your Honor's order. I guess it's a partial order on  
17 the motion.

18 THE COURT: The in camera on the deliberative process,  
19 that one you mean? What I've done so far is to say these I'm  
20 sure are not subject to deliberative process at all or they are  
21 only in part.

22 The remainder of the documents submitted for in camera  
23 review that are not part of that order may indeed qualify for  
24 the deliberative process privilege but, as you know, it's not  
25 an absolute privilege.

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1           So I still haven't done the second half of the inquiry  
2           which was briefed which is that even if it falls under the  
3           deliberative process, we should get it because -- and I have  
4           not reached that issue. But these aren't even covered, I've  
5           decided, based on the in camera review.

6           MR. PARDO: OK. There's a second outstanding motion  
7           in New Jersey that we talked about and we had asked if there's  
8           going to be argument. I understand we're not asking that. Is  
9           your Honor going to want oral argument on that motion?

10          THE COURT: Which motion?

11          MS. ELLISON: Your Honor, there's a pending motion  
12          challenging the facial sufficiency of plaintiffs' privilege log  
13          entries. And the reason we're still interested in a schedule  
14          is that plaintiffs have indicated that they're withholding  
15          privilege logs until that is resolved.

16          THE COURT: They're withholding privilege logs?

17          MS. ELLISON: We haven't had a privilege log produced  
18          for we believe the bulk of the ESI. The last privilege log --

19          THE COURT: Until I tell them whether the log they did  
20          produce is adequate.

21          MS. ELLISON: Right. They told us that they will  
22          produce new logs one week after a decision from the Court on  
23          the pending motion.

24          THE COURT: OK. I really don't have an explanation  
25          other than very busy trial schedule. I'm trying to get to it.

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1 MS. ELLISON: And it's the defendants' position that  
2 argument may not be necessary on all the entries, but we're  
3 happy to provide whatever argument you deem necessary.

4 THE COURT: Right now I don't think I need oral  
5 argument. The submissions are satisfactory. And I hope to  
6 have a decision very soon.

7 MS. ELLISON: Thank you, your Honor.

8 MR. PARDO: I believe Mr. Maher wanted to report  
9 briefly on Yosemite.

10 MR. MAHER: Your Honor, on behalf of my client,  
11 Chevron, and I'm here to report on behalf of the plaintiff  
12 also, Yosemite Springs, the lawyers in that case have reached  
13 an agreement about the settlement of the case and recommended  
14 it to our respective clients who we're waiting to hear back for  
15 final approval from the clients on the resolution of that case.

16 THE COURT: That's good news.

17 MR. MAHER: We wanted to let you know that and that we  
18 would be able to report back next month on, hopefully, our  
19 final report on whether or not it's resolved or not.

20 THE COURT: Who are the plaintiff's lawyers in that  
21 case?

22 MR. MAHER: Baron & Budd.

23 THE COURT: Good. Next conference, that will be  
24 great.

25 So this takes us to the motion to dismiss the claims

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1 for the natural resources damages, and I received three  
2 submissions on that: the March 16 motion from the defendants,  
3 April 13 opposition from plaintiffs, and the April 23 reply  
4 from the defendants.

5 This is this long, drawn-out saga about defendants'  
6 interrogatories. Plaintiffs objected to them in 2008 and 2010  
7 saying they were overbroad. Nevertheless, plaintiffs produced  
8 some documentation, some interrogatories to the extent they  
9 didn't object.

10 The objections were never ruled on because there was  
11 never a motion for protective order or motion to compel.

12 And then in September 2011, Special Master Warner  
13 suggested to defendants that they reword their discovery  
14 request and to address some of the concerns that plaintiffs  
15 had.

16 Defendants attempted to do that and they served a new  
17 set on October 5. Plaintiffs still had objections, attempted  
18 to meet and confer again. But, as I understand it, defendants  
19 agreed to table the request in order to prioritize discovery on  
20 trial sites.

21 Then defendants began pressing the issue again  
22 beginning with an email to plaintiffs on January 5 and asking  
23 the Court to put it on the agenda on January 20, 2012.

24 And we did take that up on January 20. Plaintiffs  
25 said then that the parties had reached an agreement and that

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1 plaintiffs would respond substantively to these interrogatory  
2 requests by February 17.

3 And, apparently, I said you agreed on the 17th and if  
4 it doesn't come in then, then don't need a premotion  
5 conference, just make a motion.

6 Now they say, now the defendants say whatever came in  
7 was not substantive, it was not adequate, and the Court said it  
8 was not in February 17, make a motion, so they did.

9 The problem is there's some dispute about whether the  
10 Commonwealth needs to provide information with respect to  
11 nonpotable waters such as coastal and estuarine -- is that how  
12 you pronounce it?

13 MR. AXLINE: That's close enough, estuarine.

14 THE COURT: -- estuarine, such as coastal and  
15 estuarine waters because it's not relevant to the calculation  
16 of damages because nonpotable water differs a lot to how you  
17 calculate damages to fresh water, surface water, and ground  
18 water.

19 In the end, plaintiffs produced documents and  
20 information regarding to only one site which Commonwealth says  
21 is the only site for which it sought natural resources damages  
22 with respect to ground water contamination. With respect to  
23 fresh water, surface water, plaintiffs say that they can't  
24 locate any responsive information about injuries to the waters  
25 themselves, and no other information regarding fish or loss of



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1 biota is not relevant.

2 So let me see if I can understand all of this. If the  
3 plaintiffs produced documents and information regarding only  
4 one site and says it's the only site for which it sought  
5 natural resource damage with respect to ground water  
6 contamination, then are the plaintiffs ready for an order to  
7 issue saying NRD damages are limited to this one single site  
8 with respect to ground water contamination, are you ready for  
9 that? I mean because that's what you seem to be saying, by  
10 that deadline we only did one site and so that's it.

11 MR. DEMA: We are not ready for that, your Honor.

12 THE COURT: Why?

13 MR. DEMA: They asked for discovery with regard -- on  
14 September 28, Special Master Warner heard this and he went and  
15 dealt with it very specifically. And on page 33 of the  
16 transcript, line 17 to 21, he said to Mr. Riccardulli, with  
17 regard to the discovery outstanding, make it have some type of  
18 focus that would focus in on an analogous situation that are  
19 not oil spills but would be of a type that would be informative  
20 to you for the ground water situation that's confronted here.  
21 And he said, again, I do not see how we are going to get, you  
22 know, this resolved without a new set that we can enforce.

23 In other words, to paraphrase him, the efforts they  
24 had made to that date were simply unenforceable. To this date,  
25 there is not a single order with regard to interpreting the

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1 discovery. So when they did the new set, your Honor --

2 THE COURT: Yeah, they did a new set on October 5.

3 MR. DEMA: Exactly right. And you said in the  
4 transcript, well, they did a new set and if they got it right,  
5 Mr. Axline, they got it right in October of 2011 and what did  
6 you do. The plain answer is they didn't get it right. They  
7 still asked for marine, they still asked for all the other  
8 items that have nothing to do with this case that were  
9 specifically excluded.

10 THE COURT: So what? If you put verbiage in a request  
11 that you're not entitled to discovery on, ignore it, but give  
12 them what they are entitled to. So they went off with certain  
13 marine or whatever they're not supposed to, who cares.

14 Did you answer what is relevant?

15 MR. DEMA: Absolutely. We answered their discovery.

16 THE COURT: If you say absolutely, I understand you  
17 only identified a single site which you say is the only site  
18 for which you sought or seek NRD nonresource -- sorry, I was  
19 going to say the words -- natural resource damages with respect  
20 to ground water contamination. So I said fine, if that's the  
21 only one you identified, you should be limited to that.

22 MR. DEMA: The foundational premise is incorrect.  
23 They asked from 1986 to now what sites did you have NRD  
24 analysis done with regard to in Puerto Rico, and so we defined  
25 it according to the water resources definition of our second

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1 amended complaint, and that is the only time that Puerto Rico  
2 in the past, your Honor, had done an analysis for natural  
3 resource damage and ground water.

4 We did not say that we are limiting our analysis to  
5 the one site. The question was show us your past calculations  
6 so we can be informed as to what you're doing in the future.  
7 We did that. There is one. We gave them everything and we  
8 gave them a very detailed privilege log. If they didn't like  
9 the content of the privilege log, they could object. But with  
10 regard to the extreme sanction that's at issue here --

11 THE COURT: Because it may be my problem but I'm not  
12 really following anything you're saying. It sounds like lawyer  
13 double talk to me, frankly. Either you responded and  
14 identified where you're seeking NRD damages or you didn't. To  
15 the extent you didn't, it's now May. There can't be any more  
16 pity. There has to come a point where a Court rules.

17 So I'm not understanding what the request was and what  
18 the response was. On January 20 -- wrong -- on October 5, they  
19 rewrote the questions. OK, they made a request for some  
20 information that you say is unnecessary, overbroad, ignore  
21 that, but the heart of it was there. And I said on January 20,  
22 answer it by February 17.

23 Did they answer what you asked or not?

24 MR. RICCARDULLI: They did not, your Honor.

25 THE COURT: What did you ask for with respect to NRD

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1 damages?

2 MR. RICCARDULLI: We asked for a number of things and  
3 let me try to run through them. They're in broad categories.

4 We asked them for which waters in this case they're  
5 seeking NRD damages for.

6 THE COURT: What answer did you get to that?

7 MR. RICCARDULLI: They said go look at the thousands  
8 of pages we produced to you previously and you can figure it  
9 out. That included -- and notwithstanding that this does not  
10 comply with the Rule 33(d) standards that your Honor and the  
11 special master have set forth in this case, but they used  
12 phrases like, if you see it in a soil sample, MTBE detected in  
13 the soil sample, the ground water that's adjacent to it is  
14 threatened and it's sort of vagaries like that in terms of  
15 where are you seeking for it here in this case.

16 With response to the issue Mr. Dema was just  
17 addressing, we did ask where in the past has the Commonwealth  
18 done natural resource damages assessments, sort of how have you  
19 calculated natural resource damages --

20 THE COURT: And there's only one.

21 MR. RICCARDULLI: -- in the past. Here's the problem  
22 with that, there's only one. When we served these discovery  
23 requests for the first time in September of 2008, we weren't  
24 told we only did it once with respect to ground water.

25 THE COURT: Is that right, Mr. Dema, you only did it

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1 once with respect to ground water? It's not an example; it's  
2 the only one.

3 MR. DEMA: We answered the ones we could in 2008.

4 THE COURT: I'm asking a question of you now: Is this  
5 the only one you did it for or is it an example?

6 MR. DEMA: This site, Vega Alta, that is the only site  
7 that the Commonwealth has analyzed for natural resource  
8 damages.

9 THE COURT: OK.

10 MR. RICCARDULLI: The only ground water site.

11 THE COURT: It is the only ground water site that has  
12 been analyzed and they gave you the information.

13 MR. RICCARDULLI: And we got it now.

14 THE COURT: You got it now.

15 MR. RICCARDULLI: Here's the problem with sort of why  
16 it's -- and we're happy to have this now, but here's the  
17 problem with why it's a problem getting it three and a half  
18 years later.

19 One, for those three years, there were fights over the  
20 definitions we contained and they said they were confused by  
21 the definitions we included here. But during the meet and  
22 confers, and even in front of the special master, it was these  
23 requests were so broad that they captured hundreds if not  
24 thousands of assessments. And it wasn't you got the one ground  
25 water assessment and hundreds of thousands of sea water

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1 references, but it was just vaguely hundreds if not thousands  
2 of assessments.

3 We then say and, frankly, I said it and Mr. Warner  
4 said, look, if you're going to get something, and I even said,  
5 look, if that's the case, produce what's responsive. That's  
6 what you should have done. You stood on a burden argument for  
7 almost two years. I withdrew those requests, served a new set.  
8 We previewed them for them and I actually said if there's going  
9 to be widespread objections, I want an immediate hearing on  
10 this so we can move this case forward. That's on the record  
11 what Mr. Warner said and quoted -- Mr. Dema quoted before what  
12 I said. Mr. Warner said why don't you withdraw this. And I  
13 said I'm not prepared to do that at this time. I will re-serve  
14 a set so we have a final set we can work on.

15 Here's the problem with this relevancy issue now. It  
16 turns out that that burden argument that they have answered for  
17 two and a half years wasn't a burden argument. It really was  
18 here's the Vega Alta NRD assessment which, frankly, this  
19 counsel was well aware of because they were actually counsel of  
20 record in that case for the Commonwealth. So when we served  
21 these in 2008, they knew right then there's the Vega Alta site.  
22 At minimum, I can give it to you, and we would have that for  
23 two and a half years. Instead, these are way too broad.

24 We now re-served this set. We get these answers and  
25 they say, well, here's the one and I'm not turning everything

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1 over because it's irrelevant. But here's the problem. They  
2 say they're irrelevant because it's coastal waters or sea  
3 water. Well, one, if the Commonwealth hadn't done it before,  
4 assessed ground water other than this one instance and that was  
5 in the context of litigation --

6 THE COURT: Correct, just this one.

7 MR. RICCARDULLI: -- we didn't see how they've  
8 assessed other resources within the Commonwealth. We're not  
9 asking them for how they may have assessed injuries to animal  
10 life or plant life. We're talking about water here, coastal  
11 water, at least by way of comparison --

12 THE COURT: Is it a real comparison? It's nonpotable  
13 water. It does have at best injury to animal life or plant  
14 life. It's a completely different kettle of fish, so to speak.

15 MR. RICCARDULLI: Maybe, except that we can see how  
16 they value it.

17 For example, the example I think they use in their  
18 papers was an oil spill off the coast that lands on a beach.  
19 Now you've got loss of use of the beach, damages to soil, plant  
20 life, animal life. We get to see what number the Commonwealth  
21 placed on that because now --

22 THE COURT: Why? It's still not potable water.

23 MR. RICCARDULLI: When I get their expert report in  
24 this case and they say, well, there's ground water here,  
25 frankly, that's not being used, and look at the great big

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1 number we put on it, we can say, wait a minute, here's a beach  
2 that was completely impacted by a chemical.

3 THE COURT: And you put a much lower number on it.  
4 But it is a different kind of water.

5 (Continued on next page)



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1 MR. RICCARDULLI: It is a different kind of water.  
2 This is no different than, for example, when we said in the  
3 Suffolk County case, which you recall Suffolk County Water  
4 Authority case, we said to the Suffolk County Water Authority,  
5 how did you treat other contaminants?

6 THE COURT: But that was the other contaminants of the  
7 groundwater. You should be comparing the same water.

8 MR. RICCARDULLI: One last point, your Honor.

9 When we got their delineations, the Puerto Rico  
10 delineations, on Friday of -- this past Friday, we got a  
11 delineation for a particular cite. And I can hand up a copy of  
12 this, your Honor. But it is for the CPPRC petroleum refinery  
13 site which includes apparently a stretch of beach, and includes  
14 a recharge area that includes seawater.

15 THE COURT: So that would move seawater into the  
16 potable water category, because it sort of transmogrifies  
17 itself into groundwater.

18 MR. RICCARDULLI: It certainly suggests that -- now,  
19 again, we're talking about whether or not this information is  
20 discoverable.

21 THE COURT: No, I know.

22 MR. RICCARDULLI: It's not if it's admissible.  
23 There's a very different standard for --

24 THE COURT: Mr. Riccardulli, that I know. I've been  
25 doing this for a very long time.

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1 MR. RICCARDULLI: This suggests now, of course, that  
2 this information is at least discoverable.

3 THE COURT: Not necessarily. It can't be discoverable  
4 under the principle that discovery is broader than  
5 admissibility. I mean, as I say, morning and night difference.  
6 I understand that.

7 But it has to be relevant to the subject matter in the  
8 suit. And if they are not going to be claiming these NRD  
9 damage or nonpotable -- what do they call them, marine --

10 MR. DEMA: Just to inform the record, your Honor, with  
11 regard to that -- with regard to that circle, I mean it's a  
12 circle, our complaint specifically excludes marine waters and  
13 waters that are brackish. And so to the extent there are any  
14 waters that are marine or brackish in the circle, we have not  
15 sued for them.

16 THE COURT: Except for one thing. If you can use  
17 those areas, the so-called recharge area, to convert the water  
18 resource, so to speak, to add to your reserve of groundwater,  
19 then you bring it back in. I don't know if you can do that. I  
20 mean I'm just repeating what I hear.

21 MR. DEMA: It's technically possible, but that's not  
22 within the scope of what our damages are. We are looking for  
23 groundwater, and we have excluded brackish water, even though  
24 in certain instances you can bring it and recycle it and put it  
25 through an RO and add to the groundwater stop.

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1 THE COURT: But you're not doing that.

2 MR. DEMA: We are not doing that.

3 THE COURT: So we still say, Mr. Riccardulli, he's not  
4 seeking any damages for coastal or estuarine waters; and so the  
5 NRD assessment really is irrelevant.

6 MR. RICCARDULLI: Except, your Honor, we don't think  
7 it is, and here's the point:

8 This is not the plaintiff in the other MTBE cases that  
9 have been before you where this type of analysis of damages  
10 model, for example, is purely expert-related and  
11 litigation-driven.

12 What we are trying to --

13 THE COURT: No. They've already done this assessment  
14 with respect to groundwater only once, which they've now given  
15 you. So we're talking about a motion to dismiss. What would I  
16 dismiss as a sanction when, in fact, apart from the sanction,  
17 it may be that the ruling is they didn't have to produce  
18 anything more than they did; they gave you the one groundwater  
19 site where they had calculated NRD damages in the past.

20 MR. RICCARDULLI: That's one of the failures, and we  
21 identified many in here.

22 For example, we did -- I mean throughout this their  
23 reference was go look at the files that they produced to us.  
24 These were the same site files, for example, that are at issue  
25 on which sites belong in the case and which do not. So it was

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1 go look at all the site files; now we know 400 of which don't  
2 have any evidence of MTBE. So they didn't comply with the Rule  
3 33(d) standard in answering these. They produced no new  
4 documents on behalf of PRASA or, frankly, the agency charged  
5 with doing assessments, the Department of Environmental and  
6 Natural Resources. So no new documents come in the door two  
7 and-a-half years later after we served these.

8 THE COURT: I guess my question to the plaintiff is  
9 are there any such new documents to produce?

10 MR. DEMA: Your Honor, the tabulation of natural  
11 resource damages is an expert-intensive exercise. And Vega  
12 Alta was a PCE site. We produced the documents that were  
13 producible, not subject to attorney-client privilege, and we  
14 produced a log, as well, because that was -- that's the sole  
15 site in the past at which this exercise occurred.

16 This exercise is intensively expert-driven, and it has  
17 not been done commonwealth-wide, which is what these  
18 interrogatories request. The case is managed by trial sites.

19 THE COURT: I was going to ask that of the defendants.  
20 I mean this would relate to all release sites; and I thought we  
21 were trying at this point to focus on the trial sites.

22 MR. RICCARDULLI: Your Honor, that's true. But in  
23 terms of frankly -- and they could respond to this in many  
24 ways. What we are trying to get at is in the past -- and we've  
25 been asking this since 2008, how did you calculate --

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1 THE COURT: We've covered that. There's only one  
2 groundwater site where they've calculated NRD damages in the  
3 past.

4 MR. RICCARDULLI: It may be the same formula that's  
5 used for the coastal waters. The problem is I don't know that.  
6 And it's simple, I mean they didn't have to produce hundreds of  
7 files; but, frankly, I don't even know what it is anymore. For  
8 years we heard there's hundreds of analyses, and you're asking  
9 for way too much. Now it turns out there's one. Why didn't we  
10 have this file in 2008?

11 THE COURT: I don't know that. But there's one  
12 groundwater site that calculated NRD damages, and they gave it  
13 to you. The rest are not groundwater.

14 He can't blow hot and cold. He can't come in the next  
15 time and say, Well, it turns out there's 75 groundwater sites  
16 in the past. He can't do that. He's committed to the one.

17 MR. RICCARDULLI: And even for this one groundwater  
18 site, we didn't get the calculations, because they stood on the  
19 objection that well those were performed by consultants, so  
20 therefore we don't have to turn them over.

21 So to say that we got the file on this other site --

22 THE COURT: What's that about, Mr. Dema? Why  
23 shouldn't you have to turn over the calculations? These  
24 weren't litigation consultants, were they?

25 MR. DEMA: They absolutely were, your Honor. This was

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1 Jim Brewin out of San Francisco was our opposing counsel. We  
2 had sent them a draft of the complaint. The consultants were  
3 hired by my firm. They reported to my firm. They did the  
4 analysis. Commonwealth did not have the expertise to conduct  
5 that analysis. It was all expert-driven.

6 We have just been through this in another  
7 contamination case with Chief Judge Bartle out of Philadelphia  
8 in *HOVENSA* where they had consultants retained by K&L Gates,  
9 who did work, and my sovereign client wished to see that work.  
10 And Judge Bartle said no way. You haven't shown the  
11 extraordinary circumstances under 26, and you don't get to  
12 see --

13 THE COURT: I don't know about that case and that  
14 judge, but this is somewhat different to me. This is the  
15 commonwealth's standing on this as a way that NRD damages are  
16 calculated. It is the commonwealth's position. I can't  
17 explain it. It's not like a private litigation. This is their  
18 position as to how they, the commonwealth, will calculate  
19 groundwater damages going forward forever after. This is the  
20 method. And if that's the method the commonwealth has adopted,  
21 then you have to disclose it. There's no way to defend against  
22 it without knowing.

23 MR. DEMA: Exactly. With the hypothesis you put  
24 forward, I totally agree with you.

25 THE COURT: I thank you for that.

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1 MR. DEMA: But that didn't happen.

2 So what happened is the law firms, the outside counsel  
3 for GE and the outside counsel for the commonwealth, each hired  
4 experts, reported to my Department of Justice and their  
5 hierarchy as to what they thought was a fair number. We gave  
6 the settlement documents over.

7 THE COURT: I realize that.

8 They want to know how the calculation was done.

9 I still say if this is the commonwealth's position as  
10 to how the commonwealth, as a state, an entity, is going to  
11 calculate damages for all contamination of groundwater going  
12 forward, then it's not limited to this old litigation; it's  
13 this litigation. They are entitled to know how damages are  
14 calculated. The rules require you explain your damage  
15 calculation. I don't understand -- I don't know this other  
16 case, and I'm not criticizing your appraising it, but I don't  
17 know that I agree with it. This is this case. We are entitled  
18 to know how the plaintiff is calculating damages.

19 MR. DEMA: With regard to a regulatory regime that  
20 would go forward, ONR in New Jersey has a formula that's a  
21 regulator; they have a formula. The commonwealth did not adopt  
22 this formula; the commonwealth accepted a settlement demand.

23 THE COURT: Is the commonwealth adopting this standard  
24 or method when it calculates damages in this case? Is it going  
25 to use the same methodology?

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1 MR. DEMA: It is going to use the same type of  
2 expertise to determine the --

3 THE COURT: Sounds like the identical methodology.  
4 Turn it over. Turn it over.

5 How the damages were calculated, they are entitled to  
6 know that. This is not cat-and-mouse. This is a case. This  
7 is a case. They are entitled to know it. I don't even know  
8 why you want to hide it. Turn it over.

9 MR. DEMA: We will turn it over, your Honor, with the  
10 realization it's a different set of experts.

11 THE COURT: That may be. But how --

12 MR. DEMA: The different chemical and the like.

13 THE COURT: All those reservations, turn it over.

14 Thank you.

15 What is it, Mr. Riccardulli?

16 MR. RICCARDULLI: Well, I was going to suggest, your  
17 Honor, this is exactly sort of our frustration that led to this  
18 motion.

19 THE COURT: All right. But that part is done. Now  
20 you're going to get that, how the damages were calculated.  
21 That's ordered. That was an order.

22 MR. RICCARDULLI: Your Honor, I mean these are briefs  
23 in our papers. For example, there's been a number of  
24 categories of information or requests that, frankly, the  
25 response we got was not even go look at the files we produced



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1 to you, but why don't you go look on the Internet. And I'm not  
2 going to tell you what website I'm even referring to.

3 Now, notwithstanding that, that issue came up in a New  
4 Jersey matter where Special Master Warner ruled on that and  
5 said that's just not even sufficient response, even if you're  
6 pointing me to a specific website.

7 Here it was you can go, and as we put in our papers,  
8 go on Google, run a search, and see what you can come up with;  
9 here are some names. And, again, this is the type of response  
10 we got.

11 I mean you told them in January, go respond to these  
12 requests. We did get a response. But when you go through  
13 these and look at them in terms of the Rule 33(d) failures --

14 THE COURT: Did the plaintiffs produce any ESI in  
15 response to this interrogatory?

16 MR. RICCARDULLI: They produced some. And then, of  
17 course, we complained in our opening paper that we had not yet  
18 received the privilege log. It has come in since obviously we  
19 filed the motion.

20 THE COURT: How about ESI?

21 MR. RICCARDULLI: We have not. There has been some  
22 ESI, but I don't believe it's --

23 THE COURT: Is it complete? They are saying it is  
24 complete.

25 MR. DEMA: Yes. Any ESI that was attorney-client

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1 privilege we put on the privilege log.

2 THE COURT: I understand. Otherwise you're saying  
3 your production is --

4 MR. DEMA: Yes, ma'am.

5 THE COURT: They're saying production is up to date.

6 MR. DEMA: With regard to Mr. Riccardulli's comment,  
7 it is inaccurate. They wished to know about marine oil spills.  
8 We sent them to the web, and we gave them, on Page 13 of our  
9 responses, the specific sites, the specific freighters that  
10 were involved.

11 And when you go to that web, because it's marine it is  
12 a Noah trustee. And so what you find at the sites to which we  
13 referred them is how the Noah trustee calculated the damages.  
14 And the commonwealth was just a poor cousin player in that  
15 because the federal trustee has jurisdiction. It says the  
16 amount of damages, how the assessment was done, what the  
17 damages were, what the priming restoration was, what the  
18 compensatory restoration was. We didn't, quote/unquote, say go  
19 Google. We gave them the specific details. The federal  
20 government has to publish each settlement. So those  
21 settlements give infinite detail.

22 THE COURT: I see. And you directed them to --

23 MR. DEMA: And we directed them right to it. And just  
24 for grins, I did it this morning; it's right there. It's the  
25 federal government. It's the official settlement and NRD

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1 assessment that has it. It goes on and on and on.

2 MR. RICCARDULLI: Your Honor, here's the problem: Is  
3 the commonwealth adopting that method? Can I now say you  
4 should do it this way?

5 THE COURT: That's what I just said on the other  
6 point, the litigation one. I just said that when I ruled. I  
7 said if that's how the commonwealth intends to calculate NRD  
8 damages here, that's it. And he gave some lawyerly answer,  
9 again it's going to be up to the experts. And I said turn it  
10 over. That's the method.

11 And if the same thing is true with these published  
12 settlements on the government's website, so you directed them  
13 to it, but they want a representation. Is that --

14 MR. DEMA: I will represent that we will not use that  
15 method, because none of the natural resources at issue in those  
16 marine oil spill cases have anything to do with this instant  
17 litigation.

18 THE COURT: Because it's not groundwater.

19 MR. DEMA: It is not groundwater.

20 THE COURT: So then the calculation is the one that I  
21 just told him he had to turn over.

22 MR. RICCARDULLI: Your Honor, and for the record, I'm  
23 looking at Page 13 of Mr. Dema's response where he says he  
24 included the website and the name of the freighter, and he  
25 checked the Internet for the site that's listed in here.

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1           And unless I'm looking at the wrong document here, I  
2       don't see a single reference here to the website that I should  
3       have turned to. Instead, I've got a listing of a couple of --  
4       I'll quote it. "Plaintiffs refer defendants to publicly  
5       available information on the Internet regarding the TB Vista  
6       Bella oil spill, which occurred on March 6, 1991, the Marche  
7       Berman oil spill, which occurred on January '94, and the  
8       Fortuna Reefer threatened release of oil, when the Fortuna  
9       Reefer container ran aground on a coral reef surrounding Mona  
10      Island in Puerto Rico in 1997."

11           I didn't get a list of websites, I didn't get referred  
12      to these. Instead, it's go run Google search. I didn't even  
13      know -- I found a Noah search and went and put those terms into  
14      the Internet. So I don't know where those are on Page 13.

15           THE COURT: Well, the bottom line is if you search for  
16      those releases on those dates and then how the damages  
17      calculated, you could find it; but he's not adopting that.

18           MR. RICCARDULLI: It's irrelevant.

19           THE COURT: Right. Because it's not groundwater. The  
20      groundwater, you've got one, the one that the expert did in the  
21      other litigation. And I pinned down today that that's the one;  
22      that is the methodology that will be applied to figure out the  
23      NRD damages here for groundwater. That's all that's needed.

24           Yes, Mr. Pardo.

25           MR. PARDO: Is that a ruling? Is that a finding? Are

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1 they locked in on this?

2 THE COURT: Oh, yeah. I told them that when I said  
3 produce it, and he said we will. But there are other issues  
4 that I think were raised in this motion that we didn't touch,  
5 and I understand there's some objection about not being  
6 required to produce baseline data. The commonwealth says the  
7 baseline isn't relevant. But I don't see how that could be.

8 MR. DEMA: We do not say that the baseline data is not  
9 relevant. We say, as we do in New Jersey, the baseline data is  
10 pre-contamination of MTBE.

11 THE COURT: So it's always zero?

12 MR. DEMA: Yes, it is before they introduced MTBE or  
13 TBA into the groundwaters of the commonwealth.

14 THE COURT: So essentially it's always zero.

15 MR. DEMA: It's zero in terms of their contaminants,  
16 yes, your Honor.

17 MR. RICCARDULLI: Your Honor, that unfortunately may  
18 have been the position New Jersey took, but it's one that your  
19 Honor dismissed and said of course we get other contaminant  
20 data. It's also an issue that the special master handled last  
21 September and said of course you get other contaminant  
22 information.

23 THE COURT: Oh, that's true. That goes to baseline?

24 MR. RICCARDULLI: Of course, because if MTBE at the  
25 time it was introduced, for example, into the groundwater, that

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1 water had already been unusable as a result of other  
2 contamination, we're entitled to know that. It goes to the  
3 baseline condition, the condition of that water, before MTBE  
4 entered.

5 THE COURT: What about that? I've always said other  
6 contaminants matter. I didn't know if they go into the  
7 baseline calculation, but surely they matter. I mean water  
8 isn't 100 percent pure just because MTBE hasn't been spilled,  
9 there are other contaminants. The water is either already  
10 usable or not usable, or it's usable but only with treatment.  
11 So there is a different baseline with zero, even if there's no  
12 MTBE released yet.

13 MR. DEMA: That is a factually rich argument also that  
14 is made relevant by the opinions of experts opining it.

15 THE COURT: I don't know about that. I think it's the  
16 Court. The Court has ruled repeatedly that other contaminants  
17 matter. And the quality of the water before the MTBE release  
18 matters. So if you have something theoretically 100 percent  
19 pure and then you pour MTBE in it, and it becomes unusable,  
20 then we all know that the damage is 100 percent due to MTBE.

21 But if the water has something else in it, TCE or --  
22 and it was already contaminated to some extent, then the MTBE  
23 comes along, they may say it may be damaged water, but it was  
24 damaged before we released. And that's fair argument. It's  
25 not for experts, it's for me. And I'm telling you that's the

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1 answer.

2 So they are entitled to know the condition of that  
3 water as a baseline before the release. And it can't always be  
4 zero if it had other contamination.

5 MR. DEMA: And I have no problem with that, your  
6 Honor, with regard to the trial sites at issue. They are  
7 asking for every groundwater site in Puerto Rico.

8 THE COURT: And I ask, why is that for now, Mr. Pardo,  
9 when most of the focus --

10 MR. DEMA: The other thing --

11 THE COURT: Wait, wait. Let's finish trial sites.  
12 Have you done it for the trial sites?

13 MR. RICCARDULLI: We are in the process of doing it  
14 for the trial sites.

15 But there's another entity out here, your Honor. And  
16 in terms of ESI, for example, you asked the question is it  
17 complete.

18 THE COURT: I did.

19 MR. RICCARDULLI: I think plaintiffs have said that it  
20 is for the commonwealth but their objections here in response  
21 to these interrogatories were that they were not -- they  
22 objected to us including PRASA, which is the Puerto Rico  
23 Aqueduct Sewer Authority in the definition of plaintiff as we  
24 use it in terms of the interrogatory requests.

25 We did not get anything from ESI, from PRASA. In

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1 response to these, frankly, they operate the water system  
2 largely within Puerto Rico. This is an entity that these  
3 plaintiffs have taken the position that they'll treat them as a  
4 covered person. You may recall we actually went years ago and  
5 tried to take -- treat them as a third party, and they said  
6 we'll handle their production.

7 THE COURT: Let's say they are a covered person. Then  
8 what? That makes them a plaintiff, the equivalent of a  
9 plaintiff, and they should respond?

10 MR. RICCARDULLI: Their documents certainly were  
11 captured by these requests and owed to us. And here's the  
12 problem. And they make references to invitations for us to  
13 come down to PRASA to review the files.

14 We just conferred again with this last month, and we  
15 said, You know what? We'll follow the same protocol we'll  
16 follow in New Jersey. And we actually said, Fine, we'll do  
17 that. We'll find a vendor. You guys put the responsive  
18 information in a room, and we'll have it photocopied.

19 And they said, We're not even going to do that. Just  
20 come down, and you go look through all of our files, and you  
21 pick and choose what you want. But we are not even going to do  
22 a search for -- we are not going to segregate the responsive  
23 from the nonresponsive.

24 THE COURT: Why isn't that your duty, Mr. Dema, to  
25 segregate the responsive from the nonresponsive, put it in a



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1 room? Then they'll send their vendor in to copy it and  
2 eventually search it. But why shouldn't you have to gather it?  
3 That's what all litigants do.

4 MR. DEMA: We did gather it some many months ago. And  
5 our good friends came down. And we said, These are examplar  
6 files. Please tell us the type of file that you would like.  
7 And because there's no sense in replicating everything that  
8 PRASA has. So they came down as a team. We have yet to be  
9 able to narrow it with PRASA based on feedback from that  
10 exercise. We have said that PRASA files are available to them.

11 THE COURT: What did you put in the room for their  
12 review when they came down? What was in the room?

13 MR. RICCARDULLI: Your Honor, the doors were open to  
14 us at that time. There was no, Here's a room full of stuff.

15 THE COURT: There was no gathering.

16 MR. RICCARDULLI: No, there was no gathering.

17 THE COURT: It was, Here are all of PRASA's files.

18 MR. RICCARDULLI: And here's an employee who may be  
19 able to guide you through the files and how they are organized.

20 THE COURT: It seems to me a litigant has the duty to  
21 review their records and cull out that which is responsive. In  
22 the first instance it could be more than will eventually be  
23 needed, but it should at least be a culling. Then the  
24 requesting party goes through that room and decides what it  
25 wishes to copy or what it wishes to ask for more of. But you

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1 can't just say, Come to the company and look at everywhere.

2 MR. DEMA: We are just asked for guidance because  
3 certain of the --

4 THE COURT: I just gave you guidance.

5 You got requests; put the responsive documents in a  
6 room.

7 MR. DEMA: And certain of the requests we answered  
8 specifically. For example, they asked us all the PRASA files  
9 that relate to MTBE contamination. And PRASA and the EPA had  
10 done this exercise. We gave them all those -- it's not as if  
11 we didn't give them any PRASA files. So we had been feeding  
12 them PRASA files and ESI to the extent that we are capable of  
13 understanding their desires.

14 We certainly will continue to work with them, because  
15 we agree, it's our duty to -- it's not as if we just say, Well,  
16 these are all the files from payroll records to everything. We  
17 do wish to narrow it, and we are in the process --

18 THE COURT: Then I'm hearing two different stories.

19 Mr. Riccardulli says the team goes down there. Then  
20 you say, Here are the keys to the entire plant. Pick what you  
21 want.

22 That's not good enough. You have to segregate  
23 documents.

24 MR. DEMA: I think memories differ as to how that  
25 exercise went down.

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1 THE COURT: I wasn't in Puerto Rico, sadly, this  
2 January, February, or March, so I couldn't supervise this on  
3 site, which is a thought. Next winter.

4 MR. RICCARDULLI: Maybe Mr. Dema is referencing two  
5 different sort of situations here.

6 We did go down; we did review certain files. There  
7 was a PRASA production in 2010. But in response to these  
8 discovery requests, which they've agreed that they are a  
9 covered person, we did not get documents responsive from PRASA  
10 to these. We didn't get a response.

11 THE COURT: What do you mean you didn't get a  
12 response? What did you do with PRASA documents after these  
13 document requests or these interrogatories were rewritten and I  
14 said answer them by February 17th? You produced no PRASA  
15 documents after that, between the January 20th status  
16 conference and my saying you've got to do this by February  
17 17th?

18 MR. DEMA: We had produced the PRASA documents that in  
19 any way -- that are possessed by PRASA that in any way relate  
20 to contamination in their water well.

21 PRASA is the water authority in Puerto Rico.

22 We had produced. So when they say produce any  
23 contaminants in the wells, including MTBE, in fact, we had  
24 produced those files; they have those files. They have all the  
25 files with regard to --

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1 THE COURT: It sounds like we're going to practically  
2 need an evidentiary hearing, because everything you say,  
3 Mr. Riccardulli -- you can't see through the back of your  
4 head -- is shaking his head left to right saying no. You can't  
5 see that.

6 So there's a fact dispute here as to what was  
7 produced. And if you cannot resolve it, I'm going to have to  
8 set aside two whole days and have hearings, which is kind of  
9 sad.

10 MR. DEMA: Very sad. I would certainly be happy to  
11 talk to Mr. Riccardulli because perhaps we don't understand  
12 what he is looking for.

13 THE COURT: Right.

14 MR. RICCARDULLI: Your Honor, with all due respect to  
15 Mr. Dema, I think we've heard for far too long that there's  
16 confusion among the parties.

17 I think our requests were clear at this time. Your  
18 instruction in January was very clear in this time. And PRASA  
19 was to be included here.

20 There's been no production since that time. And I'll  
21 go back and check, but I don't even think there's a Rule 33(d)  
22 response on behalf of PRASA. Instead, they objected and said,  
23 We object to you even including PRASA in the definition of  
24 plaintiff. We're not going to respond --

25 THE COURT: We're past that. They are admitting that

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1 they are in control.

2 MR. RICCARDULLI: We agree --

3 THE COURT: I think Mr. Dema is admitting that he has  
4 control, the old possession, custody, and control of those  
5 documents. And he knows it's his obligation to produce them.  
6 But where you're differing is he says we have, and you say he  
7 hasn't. And I'm not in a position to resolve that.

8 MR. RICCARDULLI: The way to start, your Honor, might  
9 be for them to get us a set of responses to these requests on  
10 behalf of PRASA with a proper Rule 33(d) response so we know  
11 which answers here they believe they produced documents in  
12 response to. That may help narrow this and alleviate the need  
13 for an evidentiary hearing, but at least we'll know which  
14 requests they think they answered on behalf of PRASA.

15 THE COURT: I'll take that suggestion, because it  
16 means I don't have to have a hearing in the next 30 days, which  
17 I'm not for anyway.

18 MR. DEMA: I will take it, as well, your Honor.

19 THE COURT: But instead, today being May 2nd, by May  
20 18th, just a mere two and-a-half weeks away, by May 18th you  
21 have to identify to Mr. Riccardulli what you say you produced  
22 from PRASA in response to what. And if you can't do it to your  
23 own surprise and shock, then do it now and identify responsive  
24 documents in PRASA if you look at your own records and find out  
25 you didn't.

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1 MR. DEMA: And I am assuming that we're talking about  
2 groundwater and not any other type of definition.

3 THE COURT: That's what I've ruled here today. This  
4 is a groundwater case. And to the extent the interrogatory as  
5 rewritten go beyond that, they are narrow for now.

6 MR. DEMA: And could you answer me, your Honor,  
7 whether this is every -- is this commonwealth-wide or is this  
8 site --

9 THE COURT: Is this 296 different locations or is this  
10 the trial sites?

11 MR. RICCARDULLI: It's my understanding that the  
12 commonwealth does not have -- that PRASA does not do testing at  
13 the sites. They run water systems. This is a different  
14 situation. We're not asking them for 296 --

15 THE COURT: It's not site-specific, but it's  
16 commonwealth-wide.

17 MR. RICCARDULLI: Well, it's not site-specific and  
18 then 296 sites. They operate wells, they have testing data.

19 THE COURT: But it's the whole commonwealth.

20 MR. RICCARDULLI: That's right, your Honor.

21 THE COURT: It's not site-specific, so to speak;  
22 that's not the way PRASA runs it. But it's all of their  
23 records.

24 MR. RICCARDULLI: Which were opened up to us.

25 MR. DEMA: If they are 80 miles apart, your Honor --

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1 just so I understand. I'm happy to comply. But if you're  
2 saying if the water is drawn from a source 80 miles away from  
3 any of the test sites, do we produce the --

4 THE COURT: Let's get it over with. It's been two  
5 and-a-half years. And for that alone there's a reason to say  
6 all PRASA files. Identify responsive materials.

7 MR. DEMA: Okay. All contaminants.

8 THE COURT: It's time to do it.

9 That's right.

10 I think that is a ruling, and you've made some  
11 progress.

12 Now what?

13 MR. PARDO: When do we get the Vega Alta files?

14 THE COURT: Ask him.

15 MR. PARDO: Can I suggest five days?

16 MR. DEMA: I'll do it by the same --

17 THE COURT: May 18th?

18 MR. DEMA: May 18th, your Honor.

19 Just so I understand the ruling, it's groundwater,  
20 it's PRASA wells.

21 THE COURT: Correct.

22 MR. DEMA: Period.

23 THE COURT: Correct. For the entire commonwealth.  
24 Right. OK.

25 Yes, Mr. Riccardulli?

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1 MR. RICCARDULLI: Your Honor, I just want to be -- I  
2 don't know what he means by PRASA wells. I want to make sure  
3 if -- they have testing data that's not affiliated with a well,  
4 but it's groundwater data, that's not linked to a potable  
5 drinking water well.

6 THE COURT: But it's groundwater.

7 MR. RICCARDULLI: It's groundwater.

8 THE COURT: If it's groundwater, it's covered, even if  
9 it's not linked to a particular well. If it's groundwater,  
10 it's covered by this ruling.

11 MR. RICCARDULLI: That's fine, your Honor.

12 THE COURT: Now, should I try to see you in a month or  
13 six weeks or what? What do you think is best for the next  
14 date?

15 MR. RICCARDULLI: A month, your Honor.

16 THE COURT: A month is what you think. OK.

17 The week of June 4th. I'm going to be on trial the  
18 entire week of June 4th, so I can do any day, there's no  
19 difference, at 4:30. We'll go as long as we go. So June 4th,  
20 6th and 7th -- no, 6th and 7th are much better. I'm sorry, the  
21 6th and 7th. I have no 4:30s Wednesday or Thursday, which  
22 means you could have the entire chunk of time 4:30 to 6.

23 MR. PARDO: I'm sorry, what days are those?

24 THE COURT: Wednesday or Thursday. I can go 4:30 to  
25 6.



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1 MR. PARDO: Could we have the Thursday?

2 THE COURT: Yup. Better for me. Well, no, it was the  
3 other way around, but that's OK.

4 You said the Thursday, right?

5 MR. RICCARDULLI: Yes, your Honor.

6 THE COURT: OK. June 7th, 4:30.

7 Please keep your letters coming in enough advance so I  
8 know what I'm doing, because I'm going to be on trial. In  
9 fact, that will be the third week of a six-week trial; I'll be  
10 very tired. So I need notice.

11 MR. RICCARDULLI: We will, your Honor.

12 MR. DEMA: So for clarity of the record, your Honor,  
13 the motion of defendants to dismiss all the NRD claims --

14 THE COURT: Decision reserved. I want to see what you  
15 come up with. It's not closed yet, this motion; it's still,  
16 let's call it, pending. We can always revisit it when I see  
17 what you've done. I'd rather keep it open.

18 MR. PARDO: Thank you, your Honor.

19 THE COURT: So all cases, status conference June 7th.  
20 Whatever issues have arisen by then we'll take up.

21 MR. RICCARDULLI: Thank you, your Honor.

22 MR. PARDO: Thanks, your Honor.

23 THE COURT: I hope I have that privilege log decision  
24 to you very soon.

25 MR. PARDO: Better yet. Thank you. (Adjourned)